United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1445

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GEORGE EDWARD MacINTYRE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE, UNITED STATES OF AMERICA

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v.

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Defendant-Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

On June 19, 1974, a Federal Grand Jury in the Western District of New York returned a one-count Indictment against the defendant, George Edward MacIntyre, charging him with a violation of Title 18, United States Code, Section 545. That count charged that on or about the 19th day of April, 1974 at the Lewiston Bridge in Lewiston, New York the defendant fraudulently and knowingly imported and brought into the United States from Canada certain merchandise, that is approximately 100 lbs. of Canadian silver coins packaged in four bags, having a face value of $1,999.80, contrary to law, in that the coins were not unladened in the presence of and inspected by a Customs officer at the first port of entry at which such merchandise arrived in the United States as required by Title 19, United States Code, Section 1461.

On May 20, 1976, a judgment of conviction was entered against the defendant after a jury trial held before the Hon.

John T. Curtin, United States District Court Judge for the Western District of New York. On June 28, 1976, the date scheduled by the Court for sentencing of the defendant, the court suspended imposition of the sentence and placed the defendant on probation for a period of three years. It is pursuant to that judgment of conviction that the defendant has taken this appeal.

Statement of Facts.

On September 27, 1973, the defendant, George Edward MacIntyre, brought into the United States from Canada over the Rainbow Bridge, Niagara Falls, New York 103 lbs. of Canadian silver coins, having a face value of $2,020, which Mr. MacIntyre did not declare (Tr. 91). The coins were contained in black pails and were covered by "gravel" (Tr. 51-52).

The United States Attorney's office was contacted at that time regarding possible prosecution of Mr. MacIntyre for smuggling these coins. However, the United States Attorney's office declined to prosecute and criminal charges have never been brought against Mr. MacIntyre regarding this incident (Tr. 91). After prosecution was declined the Customs officials seized the coins (Tr. 51) and advised the defendant at that time that *the proper procedure to use in importing these coins would be to declare them to Customs* (Tr. 91).

On April 19, 1974, at approximately 4:30 A.M., the defendant again entered the United States, this time via the Lewiston-Queenston Bridge at Lewiston, New York. He was the sole occupant of the vehicle which he drove up to the primary customs inspection station at that bridge and stopped. He was then asked whether he had bought or acquired any goods or merchandise outside of the United States which he was bring-

ing into the United States at that time. To this inquiry, he replied, "No." The Customs inspector at the primary inspection statio then referred defendant over for a secondary inspection (Tr. 17 through 20).

At the secondary inspection area, the defendant was again asked whether he had bought or acquired anything in Canada to which he responded that he had not (Tr. 22).

The Customs officials thereafter began performing a secondary inspection of the defendant's vehicle (Tr. 22 and 23). As a Special Agent from the U. S. Customs Service was going through the trunk of the defendant's vehicle, he attempted to move the spare tire. When he reached underneath to lift it, he discovered that there was a flap cut in the underside of that tire. He and other Customs officials removed the tire from the trunk. Inside they found four canvas bags. They opened these bags and determined that they contained Canadian coins (Tr. 43). Also contained in the trunk were two empty black five-gallon paint pails with covers (Tr. 44). The Canadian silver coins contained in the four bags were all minted prior to 1968 (Tr. 43, 45 and 50). It was determined subsequently that the face value of these coins was $1,999.80 (Tr. 50).

It was for these acts which occurred on April 19, 1974 that the defendant was indicted.

Upon questioning, the defendant told Customs Special Agents that he had purchased the coins from a numismatic shop in Toronto, Ontario, Canada for 100% over their face value. In other words, for approximately $2,000 face value coins he had paid $4,000. He further stated that he was taking these coins to New York City to sell to a coin dealer by the name of Jules Karp (Tr. 46), and that he intended to make $1,100 profit from the sale of the four bags of coins which he

had (Tr. 49). The defendant then wrote out a formula and explained how he had intended to make the profit. The formula he wrote is as follows:

$1000.00 Face = 720 oz. troy
Can $^{800}/_{1000}$ fine = 80% silver
585 x daily spot price
585 x 4.81 = $2813.85
- 263.85
$2550.00

The written sheet with the formula was introduced into evidence as Government Exhibit No. 9 at the trial (Tr. 92) and is reproduced in Gov.'s Appendix at page 1.a.

The defendant proceeded to explain that this formula was how he computed the silver value of $1,000 face Canadian silver coins on a given date. He stated that the first line meant that $1,000 face value in Canadian coins had a gross weight of 720 oz. troy. The second line meant that Canadian coins minted prior to 1968 had a silver content of approximately 80%. The 585 figure on the third line he explained represented the product of multiplying the 720 ounces troy gross weight of the coins times the approximate 80% silver content of those coins. For each $1,000 of face value he would therefore have approximately 585 ounces troy of pure silver. This would be multiplied times the daily spot price for silver which he explained was the market price quoted each day in New York City per troy ounce. The fourth line was the 585 troy oz. of silver for each $1,000 face value times the daily spot price of $4.81 quoted for that date which equaled a value of the silver content of the $1,000 face coins of $2,813.85. From this he would deduct the cost of his expenses of $263.85. He explained that these consisted of $100 he paid to Jules Karp for handling the coins, $100 for the cost of the smelter's fees to melt

the coins down for the silver content and $63.85 for his expenses to transport the coins to New York City. This would leave him with a profit before deducting out the cost of the coins of $2,550 per $1,000 face value. Accordingly, since he had approximately $2,000 face value coins he expected to realize $2,550 for each $1,000 face value or a total of $5,100. After deducting out the cost of the coins which he stated was double the face value or $4,000 he would have a profit for himself of $1,100 (Tr. 47 through 49).

It was established through other testimony that Canadian coins minted prior to 1968 do have an 80% silver content (Tr. 68).

It was also established during the trial that the defendant on April 18, 1974, the date prior to his having been stopped at the bridge, made a similar trip with $2,000 face value Canadian coins and sold them in New York City for an $1,100 profit (Tr. 61 and 62). In that trip the coins were shipped via American Airlines from Buffalo to New York City in two 5 gal. pails weighing 109 lbs., having a face value of $2,000 and that at the time the defendant shipped these he stated to the airline that these coins had a declared value of $5,000. The declared value being the value that the shipper puts on his merchandise which he is sending (Tr. 72-73).

The government also introduced evidence that according to the records of American Airlines on April 9, 1974 George MacIntyre shipped from Buffalo to New York City a wooden box of 123 pounds containing $2,000 worth of coins and having a declared value of $5,000. Also on April 17, 1974, a George MacIntyre shipped two five gallon pails of 110 pounds containing $2,000 worth of coins; again having a declared value of $5,000, and that these were all shipped for George MacIntyre to pick up in New York City (Tr. 71 through 74).

In addition to the above trips it was developed that the "gravel" which was found on top of the coins when he was stopped on September 27, 1973 was in fact melted silver. This was not seized from the defendant at the time and he proceeded to New York City to sell this. As to the coins which were seized on September 27, 1973, the defendant returned later, paid a fine to the U. S. Customs Service and the coins were returned to him. He then took them back to Canada and subsequently at a later date brought them back through Customs without declaring them and then sold the coins in New York City (Tr. 51-52).

POINT I

Whether circulating Canadian coins constitute merchandise under Title 18, United States Code, Section 545.

The defendant has been charged with violating Title 18, United States Code, Section 545 by fraudulently and knowingly importing from Canada into the United States merchandise, the Canadian coins, contrary to the provisions of Title 19, United States Code, Section 1461. The coins in question at the time of their importation were all minted prior to 1968 and all were still in current circulation in Canada.

Title 18, United States Code, Section 545 provides in pertinent part that:

> Whoever fraudulently or knowingly imports or brings into the United States any merchandise contrary to law . . .

violates this section.

Title 19, United States Code, Section 1461 provides in pertinent part that:

> All merchandise . . . imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the Treasury, shall be unladden in the presence of and be inspected by a Customs officer at the first port of entry at which the same shall arrive . . .

The word "merchandise" is defined for purposes of Section 1461 in Section 1401 of Title 19 as:

> Goods, wares and *chattels of every description* . . . (emphasis added)

Under Section 1401, there is no special definition given to the word chattels nor is there any case law under this section defining that word.

Under *E. Dillingham, Inc. v. United States*, 358 F.Supp. 1295 (U.S. Customs Court, 1973), courts may consult dictionaries in making their determination of the common meaning of a tariff term.

Black's Law Dictionary revised, (4th Ed. 1968) defines a chattel as "an article of personal property or any species of property not amounting to a freehold or a fee in land". Webster's Third New International Dictionary, Merriam-Webster, (1969) defines chattel as "an item of tangible, moveable or immoveable property except real estate."

Under the above two definitions the term chattel clearly includes a tangible object such as a coin.

Further, the phrase in Title 19, United States Code, Section 1401(c) of *"Chattels of every description"* (emphasis added) indicates the term chattel as used is meant to be an all inclusive concept. Therefore, Canadian coins would be covered under the definition of chattel and it would, therefore, constitute "merchandise" under this section.

Under *Lozano v. United States*, 17 F.2d 7 (5th Cir. 1927), the definition of merchandise was held to specifically include foreign coins under Section 401 and Section 461 of the Tariff Act of 1922. These sections were the predecessors of Section 1401 and 1461 of Title 19, United States Code which are quoted above. Accordingly, under *Lozano* the coins are specifically included under the term "merchandise" for purposes of the Custom's laws.

Also in *Gregory v. Morris*, 96 U.S. 619 (1877), the Supreme Court stated gold coins could in one sense be considered as money, and in another sense be considered as an article of merchandise. Page 625. In that case, as in the case at bar, the value of the metal contained in the coins exceeded the face value of those coins.

See also *The Elizabeth and Jane*, 2 Mason, 407, 408, where foreign coins were held to fall within the description of "goods" at common law.[1]

Accordingly, the Canadian foreign coins clearly come within the definition of merchandise as used in the above quoted sections.

Under ordinary circumstances, circulating Canadian coins need not be declared (unladden and inspected) as required by Section 1461. Under Title 19, United States Code, Section 1202 the Tariff Schedules of the United States are set forth. Headnote No. 5 of that Section exempts from the purview of the Tariff Act "currency (metal or paper) in current circulation in any country and *imported for monetary purposes*."

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[1] A copy of the decision of *The Elizabeth and Jane* was not available to appellee in preparing this brief, however that case is cited for that proposition in *Patton v. Brady*, 184 U.S. 608 (1901) at page 613.

(emphasis added) and classifies such currency as an intangible. Therefore, the issue then becomes whether such coins are exempted from declaration under Section 1461 in that whether or not they were "imported for monetary purposes."

The proof in this case is uncontradicted that the defendant was *not* bringing these coins into this country for monetary purposes. *He was importing silver which happened to be in the form of Canadian coins.*

The defendant paid 100% over face value for coins which were minted prior to 1968 which have a silver content of 80%. He was taking them to New York City for the purposes of selling them for approximately 150% above face value. He calculated his selling price based on the market price for silver on a given date and was selling them purely for the silver content of the coins. Also, he even intended to pay a smelter's fee to have these coins melted down for their silver content.

It is clear as noted above that the defendant was importing silver. Accordingly, he did not import these coins for *monetary purposes* and therefore these coins come within the definition of merchandise set forth above.

Arguments raised in Appellant's Brief Regarding Point I.

Applicability of Lozano.

Appellant argues that the holding of *Lozano*, that foreign coin constitutes merchandise under the Custom's laws, is inapplicable to the case now before this Court for a number of reasons.

On page 6 of appellant's brief it is argued that since the Court in *Lozano* reversed and remanded for a new trial that

any statements in that case regarding "merchandise" are dicta and not necessary to the Court's holding. This is incorrect, in that finding that the gold coins did constitute merchandise was essential for the Court to remand the case for a new trial.

Lozano was a libel for the forfeiture of 16,000 pesos Mexican gold coin which were seized by the U. S. Customs Service based on allegations that they were not declared. At the trial court level there was a conflict of testimony as to whether Lozano declared the coins to Customs at his first opportunity. Notwithstanding this conflict, the trial court directed a verdict for the United States. The Fifth Circuit Court of Appeals held that due to the conflict in testimony a directed verdict was not warranted and remanded for further proceedings.

Before the court remanded however, it specifically held that foreign coins do constitute merchandise. This was an essential finding to the remand. Otherwise the court would have entered judgment against the United States and not have remanded at all. Accordingly, the opinion of the Fifth Circuit that the coins constituted merchandise is not dicta.

Also, on page 6 of Appellant's Brief, the appellant further attempts to distinguish the *Lozano* case from the case now before this Court in that it is stated the Canadian coins involved in the present case are free from duty and at the time they were brought into the United States they were still in current circulation in both the United States and Canada.

In *Lozano* it is specifically stated on page 8 of that decision that the importation of the Mexican coins was not forbidden, and they were *not subject to duty.* Accordingly *Lozano* is not distinguishable on this ground.

As to the Canadian coins imported by MacIntyre being in current circulation in both the United States and Canada, it

was established at the trial that these coins could be spent in both countries. However, it is important for this court to take cognizance of the fact that this case was tried in Buffalo, New York and all people associated with the trial, the judge, the attorneys and jurors, with the exception of the defendant, were all from the Western District of New York which is right on the Canadian Border. It is freely conceded that Canadian coins in circulation in Canada could be spent freely and almost interchangeably with American money in Buffalo, New York. However, appellee submits that it is a matter for judicial recognition that such Canadian coins would not circulate freely in all parts of the United States but that such circulation would be limited to areas in close proximity to the Canadian border.

Further, the appellant's assertion that the Mexican coins in in *Lozano* did not circulate in the United States is a matter of pure speculation on the part of the appellant. The *Lozano* case is completely silent as to whether or not these coins could be spent as money in the United States. Again, appellee submits as a matter for judicial recognition by this court that Mexican money would in all likelihood circulate freely in border towns on the Mexican border and especially in a situation where, as in the *Lozano* case that money is made of gold.

Therefore, *Lozano* is not distinguishable from the case at bar.

Other Arguments Raised by Appellant.

1) On pages 6 and 7 of Appellant's brief it is stated that "a clear indication of violation is required for a conviction under Title 18, United States Code, Section 545" because it "is clearly malum prohibitum and as such, one is entitled to know with certainty the acts which constitute violation."

The record is clear below that the defendant was stopped by Customs less than seven months prior to the date alleged in the Indictment when he was importing a load of Canadian silver coins into the United States. At that time he was informed by Special Agents of the U. S. Customs Service that in order to bring these coins in, he must declare them. Also, regarding the September 27, 1973 incident, the coins were seized and there was a fine paid by the defendant. For the appellant to now contend that on April 19, 1974 he did not know he was bringing these coins in "contrary to law" is absolutely ridiculous.

2) Title 18, United States Code, Section 545 provides, that in addition to the criminal sanctions provided that the merchandise or the value thereof, so introduced into the United States shall be forfeited to the United States. Appellant urges on page 8 that it is "apparently the purpose of this statute to simply impress civil liability upon an individual whose imports a nondutiable item."

A clear reading of the statute indicates that this is not the case. The statute indicates that forfeiture of the merchandise so introduced in the United States is in addition to the criminal liability and not an alternative for non-dutiable items as urged by the appellant. The above quoted forfeiture provision does not distinguish between dutiable and non-dutiable items. In *United States v. McKee*, 220 F.2d 266 (2d Cir. 1955), the Court held that the criminal sanctions of Section 545 encompasses the importation of duty-free items. The Court held at page 269 that for a violation of this section, "It is no longer necessary to show that the item or items introduced clandestinely into the United States were subject to duty." It is important to note that *McKee* was a case in which criminal liability was imposed.

Also on page 8 Appellant argues that "the importance of this statute for criminal responsibility is directly toward individuals who will legally import items of contraband, *e.g.* narcotics, diamonds, whiskey, etc." The *McKee* case was based on the importation of a snow mobile, and, therefore, the section 545 criminal sanctions are not limited to contraband items. Further, even if this section could be construed as being limited to contraband, importing silver into this country could be construed as contraband even though they were in the form of circulating Canadian coins. See also *United States v. Kurfess*, 426 F.2d 1017 (7th Cir. 1970), at page 1019, wherein the Court cited the above-mentioned principle in the *McKee* case and rationalized it as correct in view of the fact that the primary purpose behind the Tariff Act of 1930 was not to raise revenue, but to supervise and regulate the inflow of imported merchandise.

Accordingly, the criminal sanctions of Section 545 were properly applied to the defendant in this case.

POINT II

The charge of the court and its failure to charge as the appellant requested was not error.

Government's Request Number Five

Appellant assigns error to the following portion of the government's request to charge number five which was given by the Court.

> The defendant's action could still be considered fraudulent even if such items were not subject to duty. It is the *intent not to declare* the merchandise which the law forbids and not the intent to evade paying duty (emphasis added).

The first sentence of the objected portion of that request comes squarely within the holding of *United States v. McKee, supra,* at page 269 where the Court holds that it is not "necessary to show that the item or items introduced clandestinely into the United States was subject to duty."

Likewise, the second sentence of the objected to portion of Government's request number five also clearly comes within the *McKee* decision. Again at page 269 the court stated that "adequate reporting of merchandise being brought into the country is absolutely necessary to the enforcement of the Customs law, and failure to comply with these requirements is just as criminal as failure to pay the Customs fees." Although the Court never used the language that "it is the intent not to declare the merchandise which the law forbids . . ." the above-quoted passage speaks of failure to report which is the same as the failure to declare. Since it is fundamental that intent is an essential element of almost all criminal violations the phrase, "intent not to declare" as used in the trial court's charge is a correct statement of the law and is not objectionable. It is clearly within the holding of *United States v. McKee.*

Government's Request Number Three

The essence of the Government's request to charge number three (fully set out at page 2 (a) of appellant's appendix), was that the court instructed the jury that circulating Canadian coins constituted merchandise unless they were imported for monetary purposes. If the jury found that they were imported for monetary purposes, they were considered as an intangible under the law, and the jury must return a verdict of acquittal. If they found that they were not imported for monetary purposes the coins then constituted merchandise

and the jury should go on to consider the other elements of the crime.

Appellant states three objections to this charge. The first objection is based on so much of the charge which is based on General Headnote number five of Title 19, United States Code, Section 1202 that provides that "currency (metal or paper) in current circulation in any country and imported for *monetary purposes* is an intangible" (emphasis added). Appellant's objection is that this headnote is not relevant to the definition of the merchandise. As was fully explored under Point I, circulating foreign coins come squarely within the definition of merchandise. An instruction to the jury as to what will operate to remove these coins from the purview of that definition, *i.e.* when imported for monetary purposes because at that point they are considered as intangibles, is perfectly proper.

The court's charge in this case as given, in effect, stated that as a matter of law coins constitute merchandise which is consistent with the all inclusive definition given in Section 1401(c) and also consistent with the holding of *Lozano*. The portion of the charge that instructed that coins brought in for monetary purposes were an intangible and therefore not merchandise was correct under General Headnote five. There is no error because the court correctly charged what the law was on a material and relevant issue. The meaning of a tariff term is a matter of law and not an issue of fact. *E. Dillingham, Inc. vs. U.S.*, supra.

It should be noted that the court correctly left the state of mind question as to whether the defendant brought the coins in for "monetary purposes" for the jury to decide.

Appellant's second objection to charge number three was that the said definition of merchandise modified the specific statutory definition given in Section 1401(c) by a General Headnote. That this in effect elevated Custom's Regulations

to the status of statutory authority. Title 19, United States Code, Section 1461 is the provision under which it is alleged that the defendant brought these coins into the country contrary to law. It provides in pertinent part that "all merchandise . . . *except as otherwise provided by . . . regulations of the Secretary of Treasury* shall be . . ." declared (emphasis added). Foreign coins imported for monetary purposes, as treated in headnote number five, have been "otherwise provided for by regulations of the Secretary of Treasury." Therefore, since the statute itself makes reference to exceptions provided by regulation it is the statute which elevates the regulation to statutory authority and the Court was proper in instructing the regulatory exception.

It is further contended under this point that Congress had provided the statutory definition under Title 19, United States Code, Section 1401(c) and that the Court should not have otherwise "constructed" that definition. The Court did not construct its own definition as contended. it has already been decided in *Lozano* on the appellate level that foreign coins constitute merchandise. Accordingly the court was merely following an appellate *interpretation* of the definition of merchandise as contained in Section 1401(c) and was not *constructing* its own definition.

Thirdly, appellant asserts that instructing regarding this headnote lent nothing to the definition of merchandise in that there is no legal definition by case or statute of the phrase "monetary purposes". Further, appellant contends that in effect the government was requesting the Court to replace the statutory definition of merchandise as set forth in Section 1401 with the definition from an undefined regulation. This was clearly not the case.

The Government merely requested the Court to instruct the statutory definition as applied in *Lozano* and the exception to

that application as set forth in General Headnote number five. As was noted under Point I the Court may consult dictionaries in making their determination of a common meaning of a tariff term under *E. Dillingham, Inc. v. United States, supra.* Accordingly, the Government requested the definition of "monetary" as cited in Webster's Third New International Dictionary, Merriam-Webster (1969), which the Court did so instruct. That is monetary means "of or relating to money" and that in order for these coins to be exempted from merchandise it would have to be imported for a purpose "of or relating to money". The Government was not asking the Court to replace the statutory definition with a term in an undefined regulation. It was merely requesting the Court to instruct that statutory definition as applied and the circumstances which would remove the foreign coins from that definition. Asking the Court to adopt a definition given in the dictionary for "monetary" was a legally permissible definition of an otherwise undefined term contained in that exception.

It should be noted that the Government's request number three had the effect of avoiding confusion in the jurors' minds. It would clear in the jurors' minds the distinction between a person merely coming back from an afternoon in Canada who happened to have some Canadian change in his pocket and the circumstances of this case. It informed the jury as to what the law is requiring the declaration of foreign currency when brought into this country and accordingly the mere informing the jury of what the law is cannot be assigned as prejudicial error.

Government's Request Number Four

Appellant on page 4 of his brief submits that the most significant of his objections were to Government's request

numbers three and four. However, appellant does not set forth in his brief what those objections are to Government's request number four. It should be noted that Government's request number four (as set forth in appellant's appendix pages 6(a) and 7(a)) is based on the assumption that the jury found that the Canadian coins were not imported for monetary purposes and therefore constituted merchandise. Appellee can only state that this request is dependent in this respect on the validity of Government's Request number three which is explored above. Otherwise without any particular assignment of error to this instruction by the appellant, appellee states that this instruction is a fair statement of the law as is cited in that request to charge and is therefore not grounds for assignment of error.

Defendant's Request to Charge

It is assigned as error the failure of the trial court to give defendant's requests to charge A and B.

On Page 12 of appellant's brief the principles are stated that it is "plain error" for the trial court to fail to instruct an essential element of a defendant's case. Further that the defendant in a criminal case is entitled to have instructions to the jury on any theory of the defense which has some foundation in evidence.

However, neither one of these principles stands to mean that the trial court is required to instruct on an element or theory of the defendant's case which has no basis in law or which is based on an incorrect interpretation or an incomplete statement of the law. This is so even if that part of the defense has some foundation in the evidence.

Defendant's request A in essence was that the jury should consider whether the Canadian coins constitute merchandise

under the law. That the definition under the law (Section 1401(c)) is that merchandise is defined as "goods, wares and chattels of every description". The defendant requested the Court to completely ignore the *Lozano* decision.

Appellant was requesting the court to turn over this finding to the jury when there has already been a judicial appellate determination that foreign coins do constitute merchandise under the statute. In effect, appellant requested the Court below to instruct the jury that as to whether the coins constitute merchandise was a question of fact which the court refused to do. Instead the court found that such coins were merchandise as a matter of law with the exception of whether or not they were brought in for monetary purposes which determination was properly left to the jury. The Court properly did not allow the jury to make a determination of law but instead properly made such determination itself.

Defendant's request B is in essence a request to charge General Headnote number five, that coin being brought in for monetary purposes exempts those coins from being merchandise (which appellant vigorously opposed as part of the Government's charge number three). The real crux of request B is in appellant's definition of "monetary purposes". Appellant requested that the court instruct the jury that "monetary purposes" means "as having to do with money".

While the government concedes that this definition is appropriate to define the word "monetary" and even submits that there is no difference between defendant's definition and the one urged by the government, *i.e.* "of or relating to money". However, the defendant's definition only defines the word "monetary" but is incomplete to define the phrase "monetary purpose". Defendant's definition is correct as far

as it goes but is an incomplete definition. The definition the phrase should be "*for a purpose* having to do with money".

It is submitted that even if the court below had adopted this definition of the *phrase* as opposed to the definition of the *word* as urged by the defendant, that is that "monetary purpose" means "for a purpose having to do with money" as opposed to the government's definition of "a purpose of or relating to money", it would have made absolutely no difference to the outcome of this case.

The proof was overwhelming that the sole purpose for the importation of these coins w .s solely for their silver content and they were not imported "for a purpose hav ng to do with money". The defendant was importing silver which happened to be in the form of Canadian coins and there is not the slightest bit of evidence that they were imported for "monetary purposes".

The trial court was requested to charge two definitions of the phrase "monetary purpose". The government's definition was complete and the defendant's definition was not. The trial court merely chose to give a clearer and more complete definition of the phrase than that urged by the appellant.

The court's charge as given avoided ambiguity and confusion on the part of the jury which may have resulted from the defendant's request. Accordingly, there was no error in not giving defendant's request B.

Conclusion.

Therefore for the above cited reasons Canadian foreign coin constitutes merchandise under Title 18, United States Code, Section 545 and there was no error in the court's

rulings regarding requests to charge or the charge as given, accordingly the defendant's convictions should be affirmed in all respects.

Respectfully submitted,

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OC 4/17/74

GOVERNMENT
EXHIBIT
9
G 74-192

1000 = face - 720 oz. troy

oz.
1000 fine = 80% silver

Com.
585 x Daily spot price

585 x 4.81 = 2813.85
263.85
2550.00

AFFIDAVIT OF SERVICE BY MAIL

RE: United States of America
vs
George Edward MacIntyre

State of New York)
County of Genesee) ss.: No. 76-1445
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 14th day of January, 19 77 I mailed 2 copies of a printed Appellee Brief in the above case, in a sealed, postpaid wrapper, to:

Michael R. McGee, Esq.
426 Franklin Street
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U.S. Attorney, Att: Richard E. Mellenger, Assistant U.S. Attorney
502 United States Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

14th day of January, 19 77.

10a